

**REMARKS**

This is in response to the nonfinal Office Action dated September 3, 1999 (Paper No. 30). Reconsideration and withdrawal of the new rejections and objections raised in the Office Action are respectfully requested. The claims have been amended as shown above. By the foregoing amendment, claims 1-12 have been amended or corrected as follows: claim 3, line 2, "engageable" has been changed into --engaging [engageable]--; claim 5, line 14, the comma has been underlined; claim 6, line 3, the term "which" has been reinserted before "faces"; and claim 6, line 4, "engageable" has been changed into --engaging [engageable]--. These same changes were proposed in the Second Amendment After Final filed on November 17, 1998, which was not entered. Claims 16 and 31 have been amended to further clarify the interrelationship between the reinforcing member, the flywheel and the elastic plate and the movement of the flywheel body. New claims 43 to 68 have been added. Support for the amendment to claims 16 and 31 and new claims 43 to 46 can be found throughout the original disclosure, for example, in Figure 1 and at column 4, lines 1-21 and 50-55. For the examiner's convenience, a marked up copy of claims 16 and 31 showing the additions and deletions from previous claims 16 and 31 is enclosed as Exhibit A.

New claims 43-46 are identical to proposed new claims 43-46 presented during the interview. New claims 47-50 are identical to claims 43-46 except they depend from claim 31 instead of claim 16. New claims 51 to 59, which depend from claim 16, substantially duplicate, in whole or in part, amended claims 2-7, 9, 11 and 12, respectively. New claims 60 to 68, which depend from claim 31, substantially duplicate, in whole or in part, amended claims 2, 4-7, 9, and 10-12, respectively. No new matter has been entered. The newly added claims 51-68 are believed to be *prima facie* allowable, inasmuch as they (1) depend from independent claims 16 and 31, and (2) derive their wording directly from the dependent claims in the original '635 patent, as amended above.

The new claims are numbered beginning at claim 43. It is applicants' understanding that claims 43-46 submitted in the March 17, 1997 amendment were not entered, because the amendment was informal/nonresponsive. See the Office Action dated October 23, 1997 at page 2. Thus, the new claim numbering begins at claim 43.

Claims 1-12, 16, 28, 31 and 43 to 68 are pending in the application. Claims 13 to 15, 17 to 27 and 32 to 42 were previously canceled. All of the changes made to the

pending claims during this reissue proceeding are shown in the above rewritten claims with appropriate underlining to show the additions, and brackets to show the deletions, in accordance with 37 CFR 1.121(b). An explanation of the support in the disclosure of the patent for each of these changes to the claims is provided in the remarks accompanying the amendment filed on November 17, 1998 and above. Moreover, a Second Supplemental Reissue Declaration covering some of the changes made by this Amendment and all previous amendments was filed on November 17, 1998. A Third Supplemental Reissue Declaration covering changes made by this Amendment and not covered by a prior declaration will be submitted upon a finding the application is in condition for allowance in accordance with MPEP 1444 at page 1400-31 (July 1998 edition).

Applicants, through the undersigned, wish to thank Examiner Luong for the courtesies extended to the undersigned, and the representatives of the assignee, Unisia Jecs, during the interview conducted on November 9, 1999. As the Interview Summary correctly notes, agreement was reached that amended reissue (independent) claims 16 and 31 presented during the interview and included in this reply do not attempt to recapture previously surrendered subject matter.

#### **Response to New Rejections Under 35 U.S.C. 251**

Claims 16, 18 and 31 stand rejected under 35 U.S.C. 251 as allegedly being an improper recapture of claimed subject matter canceled in one of the applications for the patent upon which this reissue application is based. This new rejection is respectfully traversed.

The "recapture doctrine" or "recapture rule" is applied to prevent a "patentee from acquiring, through reissue, claims that are of the same or of broader scope than those claims that were cancelled from the original application." *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 294-95 (Fed. Cir. 1984). If the reissue claim is narrower than the claim originally presented, then the recapture rule is not a bar. *Id.*

In cases where the reissue claims are broader in some aspects and narrower in other aspects, the Federal Circuit has stated: "[r]eissue claims that are broader in certain respects and narrower in others may avoid the effect of the recapture rule. If a reissue claim is broader in a way that does not attempt to reclaim what was surrendered earlier, the recapture rule may not apply." *Mentor Corporation v. Colorplast*, 998 F.2d 992, 996, 27

USPQ2d 1521 (Fed. Cir. 1993) (enclosed as Exhibit B). This fundamental view of the reissue recapture rule is also confirmed in The Patent and Trademark Office's Memorandum dated September 21, 1999 from Stephen G. Kunin regarding Guidelines for the Application of the Recapture Rule to Reissue Applications (hereinafter referred to as "the Reissue Guidelines") at page 4 ("[r]eissue claims that are broader in certain aspects and narrower in others vis-à-vis claims canceled from the original application to obtain a patent may avoid the effect of the recapture rule if the claims are broader in a way that does not attempt to reclaim what was surrendered earlier"). A copy of the Reissue Guidelines is enclosed as Exhibit C.

The Federal Circuit has stated that, if added limitations "narrow the claims in any *material aspect* compared with their broadening," then the reissue claim is broader in a way that does not attempt to reclaim what was surrendered earlier, and the recapture rule should not apply. *Mentor Corporation v. Colorplast*, 998 F.2d at 996.

Section 1412.02 of the Manual of Patent Examining Procedure (the "MPEP"), which provides relevant guidelines binding on the PTO for consideration of "recapture" issues under 35 U.S.C. 251, instructs:

Where such [reissue] claims also include some narrowing limitation not present in the claims deliberately canceled in the application, the examiner must determine whether that narrowing limitation has a *material* aspect to it. ***If the narrowing limitation has a material aspect to it, then there is no recapture.*** However, if the narrowing limitation is incidental, mere verbiage, or would be inherent even if not recited (in view of the specification), then the claims should be rejected under 35 U.S.C. 251. (emphasis added)

Thus, the MPEP clearly instructs that, in cases where there is both broadening and narrowing of a reissue claim, one looks to determine whether the narrowing limitation added to the reissue claim is *material*. This is consistent with Federal Circuit precedent in *Mentor*. Furthermore, these guidelines make clear that any limitation that is not merely "incidental" or "inherent" must be considered as "material."<sup>1</sup>

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<sup>1</sup> In *Clement*, the Federal Circuit provided a specific test for certain types of reissue claims which are broader in some aspects and narrower in other aspects:

(3) if the reissue claim is broader in some aspects, but narrower in others, then (a) if the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture rule bars the claim; (b) if the reissue claim is narrower in

It is also fundamental that a consideration of the materiality of the added limitation involves evaluation of the scope of the claim as a whole. The Federal Circuit and its predecessor court, the Court of Customs and Patent Appeals, have consistently held that, in recapture situations, “the focus is not [ ] on the specific limitations or on the elements of the claims but, rather, on the scope of the claims.” (emphasis added). *Ball Corporation*, 729 F.2d at 1436 enclosed as Exhibit D. Thus, when reviewing the claims under the recapture doctrine, the reissue claim is examined, as a whole, to determine if the narrowing limitation materially narrows the reissue claim, or if the reissue claim is attempting to reclaim what was surrendered earlier, *i.e.*, a non-material limitation effectively results in a claim that is of the “same scope” as the originally-presented and deliberately canceled claim.

The materiality aspect of the narrowing limitation was stated somewhat differently in *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997) enclosed as Exhibit E. In *Clement*, the Federal Circuit noted that in examining a narrowing limitation, it must be determined if the narrowing limitation is “germane to a prior art rejection,” that is, whether the narrowing limitation is “material.”

Another important principle in applying the recapture rule, is the prohibition against focusing solely on the feature or limitation being removed from the reissue claim. The Federal Circuit has explicitly indicated that it was not adopting this principle applied previously by some circuit courts of appeals and was instead adopting a more liberal approach taken by the Court of Customs and Patent Appeals. *Ball Corp.*, 729 F.2d at 1435 (“[w]e decline to adopt the rigid standard [of focusing solely on the feature or limitation being removed] applied in *Riley*, in favor of the more liberal approach taken by the CCPA”).

The pending reissue claims 16 and 31 are broader in some aspects than claims 1 and 8 of the Applicants’ U.S. Patent No. 5,465,635 on which this reissue

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an aspect germane to a prior art rejection, and broader in an aspect unrelated to the rejection, the recapture rule does not bar the claim, but other rejections are possible.

131 F.3d 1464, 1469. As will be discussed below, this test provided in *Clement* does not cover all possible scenarios and does not fit the facts of the present case. Rather, the analysis of *Mentor* is more suited to the present case.

application is based. Specifically, the pending reissue claims 16 and 31 are broader than claims 1 and 8 of the '635 patent in that they do not include the following limitation:

--wherein each of said elastic plate, said flywheel body and said reinforcing member comprises a first portion, said first portion of said flywheel body being placed axially between said first portions of said elastic plate and said reinforcing member, and said first portions of said elastic plate, said flywheel body and said reinforcing member defining clearances for allowing said first portion of said flywheel body to move axially between said first portions of said elastic plate and said reinforcing member.--

However, reissue claims 16 and 31 are neither broader than nor essentially the same scope as the broadest claim canceled during prosecution of the original '635 patent.

The limitation recited above was added to the claims in the "parent" application Serial No. 08/243,526 to overcome the Examiner's and the Board's earlier prior art rejection based on Numata *et al.* (Japanese Publication No. 57-058542). Thus, the broader aspects of the pending reissue claims 16 and 31 relate generally to subject matter narrowed during original prosecution, because the limitations removed from the reissue claims were the same limitations added to overcome the prior art rejection based on Numata *et al.* in the parent application. If this deletion of language to broaden the reissue claims were the only change from the patent claims, the recapture rule would certainly apply, and the claims would be properly rejected under 35 U.S.C. 251, *i.e.*, these hypothetical reissue claims would be of the same scope as the canceled claims in the original prosecution.

However, this is not the case.

The reissue claims 16 and 31 are different from the canceled claims in the parent and grandparent applications because they include the following newly-added narrowing limitations:

--wherein said elastic plate is clamped axially between said reinforcing member and said shaft end of said crankshaft, and wherein a first portion of said flywheel is axially movable with respect to said reinforcing member and said elastic plate.--

These narrowing limitations in the pending reissue claims have been, and apparently still are, considered by the Examiner to patentably distinguish over the Numata *et al.* reference and the other prior art of record. Thus, there is no question that this narrowing limitation has a material aspect to it, and that the limitation is not incidental, mere verbiage, or inherent in the canceled claims. That is, this limitation renders the

claim, as a whole, patentable over the prior art. The Applicants are not recapturing the subject matter of a canceled claim, as stated in the Office Action. Instead, the Applicants are presenting the Examiner with a materially narrower claim than the claims canceled or surrendered in the parent and/or grandparent applications, the material narrowness being the limitations noted directly above. The recapture rule does not prohibit such materially narrower claims in this reissue application.

The Office Action states that the narrowing limitation added to claim 16 “is narrower in another aspect unrelated to the prior art rejection based on Numata *et al.*” Applicants respectfully disagree. The narrowing limitation added to claim 16 is indeed directly related to the prior art rejection based on Numata *et al.*, and in fact, the limitation being removed and the limitation being added are related to each other. Specifically, the limitation being removed from claims 1 and 8 defines an interrelationship between the elastic plate, the flywheel body and the reinforcing member (reference Nos. 2, 5 and 4, respectively, in Figure 1 of the present application), and axial movement of the flywheel body relative to the reinforcing member and elastic plate. Likewise, the narrowing limitation being added recites an interrelationship between the crankshaft, elastic plate, the flywheel body and the reinforcing member (reference Nos. 1, 2 and 4, respectively), and axial movement of the flywheel body relative to the reinforcing member and elastic plate, albeit somewhat more broadly. Thus, this is not the case like *Clement* where the limitations removed in the reissue claims were directed to temperature, mechanical energy and pH limitations, whereas the added limitations were directed to final pulp brightness. Instead, as noted above, the limitations being added are structurally related to the limitations being removed from patent claims 1 and 8. That is, in the words used by the Federal Circuit in *In re Clement*, the narrowing limitation is certainly “germane to a prior art rejection” in that both the narrowing limitation and the removed limitation are structurally related and both overcome the very same prior art rejection being based on Numata *et al.* by referring to essentially the same relationship(s) between the same essential elements of the invention. 131 F.3d at 1469.

The facts of the present case are similar to the facts of *In re Richman*, 409 F.2d 269, 161 USPQ 359 (CCPA 1969), in that the limitation being broadened was a limitation added (in the instant case) or narrowed (*Richman*) to obtain allowance of the claim. (*Richman* is enclosed as Exhibit F). In *Richman*, the limitation at issue was a

“control signal” in a television which provided “color killing” and “mode synchronization.” *Id.* at 275. In canceled claims 1-15, the control signal was claimed as a “unidirectional control signal representative of the phase relation of ... [the] generated signal and ... [the] synchronizing signal.” *Id.* The control signal in the original patent claims specified the polarity of the magnitude of the control signal, which the Patent Office found during examination of the reissue to be narrower than the control signal limitation in the originally canceled claims. *Id.* at 274. The control signal in the reissue claims did not specify polarity, but was required to have “one value when the reference generator output is in synchronism with the synchronizing signal at the desired phase relation and ‘another value’ both when the synchronizing signal is absent and when it is present but out of synchronism with the reference generator oscillations.” *Id.* at 275. The Patent Office found this limitation of control signal to be of the same scope as that of the canceled claims and implicitly to be broader than the recitation of the control signal in the patented claim. *Id.* at 274. Since the patentee had included the polarity of the control signal in the original patent claims in order to obtain a patent, the Patent Office argued that the patentee should not be allowed to alter or omit this polarity limitation for the control signal in the reissue claims. *Id.*

The CCPA disagreed and noted that the Patent Office was impermissibly focusing on the specific limitation added during prosecution rather than on whether the reissue claims are of the same scope as the canceled claims so as to recapture canceled subject matter. Specifically, the court stated that “[t]he question raised is whether the appealed claims are of the same scope as the canceled claims, not whether they lack some specific recitation absent from the cancelled claims but included in the patent claims.” *Id.* The court went on and found that the control signal limitation was narrower in the reissue claim than the original application claims, and thus the reissue claims were not attempting to recapture canceled subject matter. *Id.* at 276. Thus, although the patentee was broadening the control signal limitation, vis-à-vis the original patent claim (the same limitation which had been narrowed in order to obtain a patent), the court found no impermissible recapture as long as the claims were narrower in at least one significant respect than the canceled claims. *Id.* at 276.

In the present case, the limitations at issue involve the interrelationship between the elastic plate, the flywheel body and the reinforcing member and the axial

movement of the flywheel body relative to the reinforcing member and elastic plate. This interrelationship is analogous to the “control signal” in *Richman*. In the present case, this relationship was added to obtain allowance of the claims. In *Richman*, the control signal limitation was narrowed to obtain allowance. In the present case, the interrelationship is still claimed in the reissue claims but in a way that is broader than the relationship allowed in the patent claims. In *Richman*, the control signal limitation claimed in the reissue claims was broader than the control signal limitation allowed in the patent claims. In spite of the fact that the control signal limitation in the reissue claims was broader than the control signal limitation and had been relied upon to obtain allowance of the claims, no recapture was found. The CCPA found that the control signal limitation was materially narrower in the reissue claims than the control signal in the canceled application claims.

Since the facts of the present case are essentially parallel to those in *Richman*, no recapture is present based on the precedent of *Richman*. Of course, *Richman* is binding precedent on the Federal Circuit, unless overruled by an *en banc* panel, which has not taken place. Applicants submit that the PTO cannot maintain the present rejection based on recapture without acting contrary to the binding precedent provided by the *Richman* case.

Moreover, irrespective of relatedness of the cancelled or added limitations to each other, the narrowing limitations are materially narrower and thus avoid recapture. Without the narrowing limitation, the claims would most certainly have been rejected by the Examiner based on Numata *et al.* for the same reasons sustained on appeal in the grandparent application. The narrowing limitation is, thus, directly related to this prior art rejection because the limitation makes the claims patentable over the Numata *et al.* reference, and accordingly, is “material” or “germane to a prior art rejection.” Although the narrowing limitation added to the reissue claims 16 and 31 is different in scope from the corresponding limitation found in the patent claims 1 and 8, the limitations are nevertheless similar in that they both distinguish over the Numata *et al.* reference by reciting a different arrangement of the elastic plate relative to the reinforcing member. A limitation added to a claim to obtain its allowance can be broadened by reissue “if the limitation turns out to be more restrictive than the prior art required.” *Richman*, 409 F.2d at 274-275, 161 USPQ 359 (CCPA 1969).



The facts in the present case are also fully consistent with those in the *Mentor* case, *supra*. *Mentor* differs factually in one critical aspect. In *Mentor*, the narrowing limitation was held to “not materially narrow the claim.” *Mentor*, 998 F.2d at 996-97. In the present case, the narrowing limitations in claims 16 and 31 have been found to be material, since they render claims 16 and 31 patentable over Numata *et al.*, i.e., the prior art reference over which the claims were originally rejected.

The present case is also similar to other prior court cases in which no violation of the recapture rule was found. For example, in *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 294-95 (Fed. Cir. 1984), the reissue claim was narrower than the canceled claims in an aspect relating to a prior art rejection and broader in an aspect unrelated to the rejection. The court allowed the reissue claim because the patentee was not attempting to recapture surrendered subject matter. *Id.* In *Whittaker Corp. v. UNR Industries, Inc.*, 911 F.2d 709, 15 USPQ2d 1742 (Fed. Cir. 1990) (enclosed as Exhibit G), the court held that a claim added to a patent during reissue is not invalid under the recapture rule when it contains a limitation making it narrower in scope than a similar claim that was canceled during the original prosecution. Similarly, the Applicants in the present case are presenting claims in this reissue application that are materially narrower in scope than the surrendered claims 16 and 18 in the grandparent application. Thus, the Applicants are not trying to recapture the same claims that were canceled or surrendered during the original prosecution.

The present case is different from the facts of the prior court cases cited by the PTO in support of the recapture rule. For example, the reissue claims in *In re Clement* were materially broader, and only incidentally narrower, to the claims surrendered during the prosecution. 131 F.3d at 1471, 45 USPQ2d at 1165. The reissue claims in *Clement* were broadened by removing limitations that directly related to several prior art rejections made during the prosecution. *Id.* *Clement*, however, did not add any narrowing limitations having a material aspect that would avoid the prior art rejections and that had not been considered before. The only narrowing limitation in the reissue claim of *Clement* was a limitation that had previously been added in another claim in an effort to overcome a prior art rejection. *Id.* This is much different from the present case where the reissue claims have materially narrowing limitations that are (1) related to the limitation removed, (2) not found in any of the surrendered or canceled claims in the parent and/or grandparent

applications, and (3) relate to the previous prior art rejection and patentably distinguish over the Numata *et al.* reference that was the basis for the rejection in the original patent.

As noted above, the court in *Clement* announced “principles” for reissue claims, which included claims broader in some aspects and narrower in other aspects. *Id.* at 1469. Specifically, the test indicated: (a) if the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but narrower in another aspect completely unrelated to the rejection, the recapture rule bars the claim; or (b) if the reissue claim is narrower in an aspect germane to prior art rejection, and broader in an aspect unrelated to the rejection, the recapture rule does not bar the claim. *Id.* In the facts of the present case, part (a) does not apply, because, while being broader in an aspect germane to patentability in that the limitation noted above has been removed, the reissue claim is not narrower in an aspect unrelated to patentability. Instead, the present reissue claims are narrower in an aspect intimately related to patentability and, in fact, to the prior art rejection in the parent cases. Likewise, part (b) does not apply because the reissue claim is broader in an aspect related to patentability by virtue of the removed limitation. Thus, the “principles” *Clement* are not applicable in the analysis of the present facts.

The present case is also different from *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472 (Fed. Cir. 1998) (enclosed as Exhibit H), in that there has been no showing that any arguments made during the prosecution of the parent and/or grandparent applications were sufficient to trigger the recapture rule. In *Hester*, the court held that surrender of claimed subject matter can occur through arguments alone. 142 F.3d at 1480, 46 USPQ2d at 1648. This holding is not relevant to the present case where the surrendered subject matter identified by the PTO is found only in the claims that were rejected and appealed in the grandparent application, and not in the Applicants’ arguments.

None of the examples provided in the Reissue Guidelines is factually applicable to the present facts, and none conflicts with Applicants’ position that the present claims are not recapturing canceled subject matter. In fact, the Reissue Guidelines state at page 6 that “each recapture issue should be decided on a case-by-case basis.” Although not expressly dealing with a comparable fact situation, the Guidelines and all the examples therein are predicated on the implication that a narrowing limitation which directly relates to the original rejection is sufficient to avoid recapture, e.g., see Example 4(b). As described above, the narrowing limitations added to reissue claims 16 and 31 do, in fact,

relate to the prior art rejection based on Numata *et al.*, in that the limitations originally added to overcome the rejection based on Numata *et al.* and the present narrowing limitations both relate to the interrelationship between the elastic plate, the flywheel body and the reinforcing member and the axial movement of the flywheel body relative to the reinforcing member and elastic plate. Thus, since the present (material) narrowing limitations do relate to the prior art rejection based on Numata *et al.*, a finding of no impermissible recapture is also entirely consistent with the Reissue Guidelines.

Applying Section 1412.02 of the MPEP, quoted in part, above, the narrowing limitation found in the reissue claims 16 and 31 is not “incidental, mere verbiage, or ... inherent” because it has a material aspect to it that is germane to the rejection based on Numata *et al.* and makes the claims patentable over the Numata *et al.* reference. Thus, the MPEP, as well as the prior court cases discussed above, support the Applicants’ position that there is no improper recapture in the present case.

Applicants are relying on express precedent from the Court of Appeals for the Federal Circuit and its predecessor court, the CCPA. The cases cited in the Office Action do not (and, in fact, cannot) overrule the prior cases on which Applicants rely. For the reasons explained in detail above, the cases cited in the Office Action do not contain fact situations similar to the present facts, nor do these cases express rules that either contradict the earlier case law or require a finding of reissue recapture in the present case. Finally, the present case is clearly and unequivocally governed by the instructions given to Examiners in the current version of MPEP § 1412.02, PTO which expressly cites and is based on the *Ball Corp.* and *Clement* cases. No significant Federal Circuit decisions or other changes in the law have occurred since the *Clement* case (1997) or publication of the latest version of the M.P.E.P. (1998) that would serve as a basis for disregarding the PTO's own manual. Moreover, it is understood that the PTO is bound by the guidelines set forth in the MPEP. *In re Kaghan*, 387 F.2d 398, 156 USPQ 130 (CCPA 1967).

It was agreed upon during the interview that claims 16, 28 and 31 were not impermissibly recapturing surrendered subject matter. Specifically, as set forth in the Interview Summary, some of the enumerated bases for no impermissible recapture were:

- (1) the portion 4b [of the reinforcing element] has no critical function, it is cited in the original claim 1 to define the free space next to the flywheel; (2) the case law such as *Ball*, *Clement* or *Richman* support the position that to determine the recapture rule the claim in reissue application should be interpreted as a whole; (3)

the merit of each case is dependent on its own facts; (4) the Memorandum regarding the Recapture Rule of the Office on September 21, 1999 supports the conclusion that applicant's claims are not recaptured claims as seen in the section "Reissue Claims Are Broader in Some Aspects, But Narrower in Others" on page 4 of the Memo; (5) there have been no cases that overrule the earlier case law of CCPA and CAFC; (6) applicant believes that the present facts are very close to earlier cases, e.g., *Richman* case; (7) M.P.E.P. 1412.02 also controls; (8) there is no mechanical stop in the instant flywheel; and (9) the added claim amendments are directed to the same prior art rejection made in the original patent.


In view of the agreement reached during the interview and the remarks *supra*, it is respectfully submitted that this reissue application is now in condition for allowance. Early issuance of a Notice of Allowance is respectfully requested.

If the Examiner has any questions or comments that could place this application into even better form, he is encouraged to contact the Applicants' undersigned representative at the number listed below.

Respectfully submitted,

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